



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-343

Appeal P-910012

Ministry of the Solicitor General



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ORDER

BACKGROUND:

The Ministry of the Solicitor General (the institution) received a request for access under the Freedom of Information and Protection of Privacy Act (the Act) to all information held by the institution relating to investigations pertaining to the requester. In particular, the requester sought access to information relating to his murder investigation and to his arson and fraud investigation.

The record which the institution identified as being responsive to the request consisted of 593 pages. A total of 282 pages were released to the appellant in their entirety. Access to the remaining 311 pages was denied, in whole or in part, pursuant to sections 14(1)(c) and (e), 14(2)(a), 15(b), 21(1)(f), 49(a) and/or 49(b) of the Act.

During the course of mediation, an additional 243 pages were identified by the institution as being responsive to the request. The institution released 201 of these pages to the appellant, and denied access to the other 42 pages, either in whole or in part, claiming sections 14(2)(a), 19, 21, 49(a) and/or 49(b) of the Act.

The requester appealed the institution's decision to deny access.

Further mediation of the appeal was not successful, and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the institution, the appellant and his solicitor, the Federal Department of Justice and the Royal Canadian Mounted Police (the R.C.M.P.). Written representations were received from the appellant's solicitor, the institution and the Department of Justice.

In its representations, the institution abandoned its claim under section 14(1)(c). The institution also altered its position with respect to the application of certain exemptions to specific pages of the record during the inquiry stage.

PRELIMINARY MATTERS:

Having reviewed the record, I find that the certain pages contain notes made by police officers with respect to matters other than those related to the appellant. I find that these pages, or those parts of pages which have not already been released to the appellant, are not responsive to the request and fall outside the scope of this appeal. These pages are:

1, 2, 5, 9, 18, 21, 25, 26, 28, 31, 47, 51, 52, 55, 62, 67, 68, 72-74, 76, 77, 79, 85, 86, 88, 89, 91-93, 95, 96, 98, 100, 101, 103-113, 115, 117-122, 124, 126-128, 130-136, 138, 140-149, 152-156, 160, 162-165, 170, 171, 175-178, 180, 181, 183-186, 189-197, 199, 200, 202, 203, 206, 207, 209-211 and 214.

Some parts of the remaining pages also contain similar non-responsive information, and I also find that these parts fall outside the scope of this appeal. Pages 188 and 208 fall into this category.

The institution did not claim any exemptions for pages 188 and 208. As far as page 188 is concerned, the institution found that most of the page contained information which fell outside the scope of the request, and released the rest of the page to the appellant. I have reviewed this page and find that one line (nine lines from the bottom), which the institution found to be outside the scope of the request, does relate to the arson investigation, and I will discuss the proper treatment of this line in my discussion of Issue A. Similarly, I find that three lines on page 208, which the institution found to be non-responsive, do relate to the appellant's request. No exemptions were claimed by the institution for these three lines, and my discussion of Issue A will address whether these lines contain any personal information, thereby raising the potential application of the section 21 mandatory exemption.

With respect to page 219B, the institution originally claimed sections 14(2)(a) and 15(b) as the basis for exempting the severed portion of this page, but withdrew these claims in its representations. I will consider the proper treatment of this page in the same manner as outlined above for page 208.

Finally, the record contains the following duplicate pages: 214 (415), 219B (222), 220 (223), 304 (318), 305 (319) and 306 (307, 335, 433). My order with respect to pages 214, 219B, 220, 304, 305 and 306 applies to their duplicates.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether any of the information contained in the record qualifies as "personal information", as defined by section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies to any parts of the record.
- C. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to any parts of the record.
- D. Whether the discretionary exemption provided by section 15(b) of the Act applies to pages 257 and 454 of the record.
- E. Whether the discretionary exemption provided by section 49(a) of the Act applies to any parts of the record.
- F. Whether any of the discretionary exemptions provided by sections 14(1)(e), 14(2)(a) and/or 19 of the Act apply to parts of the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the record qualifies as "personal information", as defined by section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
...
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
...
- (g) the view or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Having reviewed the record, I find that the parts of all responsive pages which have not already been released to the appellant, with the exception of pages 188, 208, 219B and 454, contain personal information of one or more identifiable individuals.

Specifically, I find that all parts of page 257, with the exception of the first and second line of the left-hand column, contain the personal information of the appellant only. All remaining pages or parts of pages contain the personal information of individuals other than the appellant (the

affected persons), including the name, address, phone number, age, marital status, medical history, employment history, fingerprints, and/or personal views or opinions of these individuals about matters other than the appellant. Parts of some of these remaining pages contain the personal information of both the appellant and certain other individuals, specifically pages 33, 34, 38-41, 45, 64, 90, 116, 151, 161, 248, 250-253, the first and second line of the left column of page 257, 272-275, 536, 544-551, 818, 820, 821, and 824-828.

As far as pages 188, 208, 219B and 454 are concerned, they are pages from police notebooks and correspondence which contain information which is responsive to the appellant's request, but I find that they do not contain personal information of any identifiable individual. Because the institution has not claimed any exemptions for the responsive parts of pages 188 and 208, and has withdrawn all exemption claims for the severed part of page 219B, I order that the responsive parts of these three pages be disclosed to the appellant. I have attached a highlighted copy of pages 188 and 208 with the copy of this order sent to the institution, which identifies the information which should be disclosed to the appellant.

With respect to page 454, the institution claims section 15(b) as the basis for exempting this page, and I will discuss the proper treatment of this page in my discussion of Issue D.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies to any parts of the record.

My discussion of Issue B will deal with those parts of the record which contain the personal information of the affected persons. The page which contains the personal information of the appellant only (page 257), and those pages which contain the personal information of both the appellant and certain other identifiable individuals will be considered under Issue C.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. One such circumstance is contained in section 21(1)(f) of the Act, which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and 21(3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The institution claims that section 21(3)(b) applies, raising the presumption that disclosure of the severed information would constitute an unjustified invasion of personal privacy. This section reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In its representations, the institution states that various pages of the record were compiled and are identifiable as part of investigations into possible violations of law. Some pages relate to an arson and fraud investigation conducted by the Ontario Provincial Police, and others relate to a murder investigation. Both investigations concern the appellant. The arson and fraud investigation did not result in any charges; the murder investigation resulted in the arrest and conviction of the appellant.

In my view, all pages of the record at issue in this appeal were "compiled as part of an investigation into a possible violation of law". As such, the requirements of section 21(3)(b) have been satisfied, and I find that disclosure of the severed parts of the record containing personal information of the affected persons would result in a presumed unjustified invasion of their personal privacy.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(b) have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption.

Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the record does not contain any information relevant to section 21(4).

In Order 20, Commissioner Linden stated that "... a combination of circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view, such a case would be extremely unusual".

Section 21(2) states in part:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;

In his representations, the counsel for the appellant states that the appellant has been wrongfully convicted of murder. He says that the appellant's trial lawyer was not given full disclosure at the time of the trial, and points out that the appellant wants his case to be re-opened. The appellant wishes access to all relevant records in order to determine whether they will be helpful in gaining a review of the murder conviction.

The institution submits that the severed information is not relevant to a fair determination of rights affecting the appellant, and points out that:

... [T]he personal information ... pertaining to the arson investigation can be of no relevance to the requester as he was never charged with arson. With regard to the records pertaining to the murder investigation, the institution has released as much information as possible without invading the privacy of other individuals...

The institution also submits that the personal information contained in the records is highly sensitive, pointing out that the affected persons may be fearful for their "lives and safety" if the appellant receives access to the record. The institutions states:

...the dredging up of these stressful events which happened a number of years ago is not necessary as much of the information was anonymized...

... As the events referred to in the record occurred over ten years ago, we submit that [the affected persons] should have the right to enjoy their lives in serenity and safety...

I have considered all representations and carefully reviewed the record. In the circumstances of this appeal, and based on the evidence before me, I find that the arguments in favour of disclosing the severed parts of the record to the appellant are not sufficient to outweigh the presumed unjustified invasion of personal privacy of the affected persons under section 21(3)(b).

Accordingly, I find that disclosure of those parts of the record I have identified as containing personal information of the affected persons would constitute an unjustified invasion of their personal privacy, and I uphold the head's decision to deny access to these parts of the record.

ISSUE C: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to any parts of the record.

Under Issue A, I found that parts of 39 pages of the record contain the personal information of both the appellant and other identifiable individuals. I will now consider whether section 49(b) applies to these parts of the record.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right to access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is found in section 49(b) of the Act, which reads as follows.

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Subsection 49(b) of the Act introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her privacy. If the head determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, subsection 49(b) gives the head discretion to deny access to the personal information of the requester.

In my discussion of Issue B, I found that the presumption of an unjustified invasion of personal privacy of the affected persons was established under section 21(3)(b), and that this presumption was not rebutted by the application of any of the provisions of sections 21(4) or 21(2) of the Act. For the same reasons which I expressed under Issue B, I find that the disclosure of the parts of the record which contain the personal information of both the appellant and the affected persons would constitute an unjustified invasion of the personal privacy of the affected persons.

Section 49(b) is a discretionary exemption, giving the head the discretion to refuse to disclose personal information to the individual to whom it relates where the disclosure would constitute an unjustified invasion of another person's privacy. I find nothing improper with the head's exercise of discretion in the circumstances of this appeal.

As a result of the manner in which I have disposed of Issues A, B and C, only page 454 and the part of page 257 which contains only the appellant's personal information remain at issue.

ISSUE D: Whether the discretionary exemption provided by section 15(b) of the Act applies to pages 257 and 454 of the record.

The institution claims section 15(b) of the Act as one of the bases for exempting pages 257 and 454 of the record. Section 15(b) reads as follows:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

reveal information received in confidence from another government or its agencies by an institution;

In order to qualify for exemption under subsection 15(b), pages 257 and 454 must meet the following test:

1. the pages must reveal information received from another government or its agencies; **and**
2. the information must have been received by an institution; **and**
3. the information must have been received in confidence.

(Order 210)

Page 454 is a letter to the institution from the federal Department of Justice. In its representations, the Department of Justice confirms that it sent this letter to the institution, and states that the letter was provided on the understanding that it was to be kept in confidence. The institution confirms that the letter was received from the Department of Justice on the basis that it would be treated confidentially.

In my view, disclosure of page 454 would reveal information received by the institution in confidence from the Department of Justice, and I find that the requirements for exemption under section 15(b) have been satisfied.

Page 257 is part of a package of material prepared by the R.C.M.P. regarding the arson investigation. In its representations, the institution states that the correspondence was forwarded by the R.C.M.P to the Ontario Provincial Police (which is a branch of the institution), on a confidential basis. I find that the requirements for exemption under section 15(b) have also been satisfied with respect to page 257.

The head has provided representation regarding the exercise of discretion in favour of claiming exemption under section 15(b). I have reviewed these representations and find nothing improper in the circumstances.

ISSUE E: Whether the discretionary exemption provided by section 49(a) of the Act applies to any parts of the record.

Section 49(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, **15**, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; (emphasis added)

Under Issue A, I found that all but the first and second line of the left column on page 257 contains the personal information of the appellant alone. Under Issue D, I found that page 257 qualifies for exemption under section 15(b).

I have reviewed the representations made by the head in deciding to exercise discretion in favour of claiming section 49(a) to exempt page 257, and find nothing improper in the head's decision to deny access to this page.

Because of the manner in which I have disposed of Issues A, B, C and D, it is not necessary for me to consider Issues F.

ORDER:

1. I order the head to disclose page 219B (222) in its entirety, and those parts of pages 188 and 208 which I have found to be responsive to the request and not subject to exemption. I have attached a highlighted copy of pages 188 and 208 with the copy of my order provided to the institution, which identifies the parts of the pages that should be disclosed to the appellant.
2. I uphold the head's decision to deny access to the remaining pages and severed pages.
3. I order the head to disclose the records outlined in Provision 1 within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order.
4. The institution is further ordered to advise me in writing within five days of the date of on which disclosure was made. Such notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
5. In order to verify compliance with the provision of this order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, only upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ August 13, 1992